

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-2419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

April 10, 2013
2:00 p.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiffs:

3 Hagens, Berman, Sobol, Shapiro LLP, by THOMAS M.
4 SOBOL, ESQ. and KRISTEN JOHNSON PARKER, ATTORNEY,
5 55 Cambridge Parkway, Suite 301, Cambridge,
Massachusetts
02142;

6 Ellis & Rapacki LLP, by FREDRIC L. ELLIS, ESQ.,
7 85 Merrimac Street, Suite 500, Boston, Massachusetts
02114;

8 Crandell & Katt, by PATRICK T. FENNELL, ESQ.,
9 366 Elm Avenue S.W., Roanoke, Virginia 24016;

10 Andrews Thornton, by ANNE ANDREWS, ATTORNEY, ESQ.,
2 Corporate Park, Suite 110, Irvine, California 92606;

11 Brown Rudnick, by DAVID J. MOLTON, ESQ., Seven Times
12 Square, New York, New York 10036;

13 Lieff, Cabraser, Heimann & Bernstein, LLP, by MARK P.
14 CHALOS, ESQ., One Nashville Place, 150 Fourth Avenue,
North, Suite 1650, Nashville, Tennessee 37219-2423;

15 Sugarman, Rogers, Barshak & Cohen, P.C., by ANTHONY
16 V. AGUDELO, ESQ., 101 Merrimac Street, 9th Floor,
Boston, Massachusetts 02114;

17 Law Office of Hugo & Associates, MICHAEL R. HUGO,
18 ESQ., 1 Catherine Road, Framingham, Massachusetts
01701;

19 Colling, Gilbert, Wright & Carter, by MELVIN B.
20 WRIGHT, B.C.S., 801 N. Orange Avenue, Suite 830,
Orlando, Florida 32801;

21 For the Defendants:

22 Harris Beach PLLC, by FREDERICK H. FERN, ESQ.,
100 Wall Street, New York, New York 10005;

23 Hinshaw & Culbertson LLP, by DANIEL E. TRANEN, ESQ.,
24 28 State Street, 24th Floor, Boston, Massachusetts
02109;

25

1 APPEARANCES (CONTINUED):

2 For the Defendants:

3 Tucker, Ellis & West LLP, by RICHARD A. DEAN, ESQ.,
4 1150 Huntington Building, 925 Euclid Avenue, Cleveland,
Ohio 44115-1414;

5 Michaels, Ward & Rabinovitz LLP, by DAN RABINOVITZ,
6 ESQ., One Beacon Street, Boston, Massachusetts 02108;

7 Todd & Weld LLP, by HEIDI A. NADEL, ESQ.,
8 28 State Street, 31st Floor, Boston, Massachusetts
02109;

9 Duane Morris LLP by MICHAEL R. GOTTFRIED,
10 ESQ., 100 High Street, Suite 2400, Boston, Massachusetts
02110-1724;

11 Law Offices of Jay J. Blumberg, by JAY J. BLUMBERG,
12 ESQ., 158 Delaware Street, P.O. Box 68
Woodbury, New Jersey 08096;

13 Lawson & Weitzen, LLP, by RYAN A. CIPORKIN, ESQ. and
14 FRANKLIN LEVY, ESQ., 88 Black Falcon Avenue, Boston,
Massachusetts 02210;

15 Tucker, Saltzman & Dyer, LLP, by SCOTT J. TUCKER,
16 ESQ., 100 Franklin Street, Suite 801,
Boston, Massachusetts 02110;

17 Ulmer & Berne, by JOSEPH P. THOMAS, ESQ., 600 Vine
Street, Suite 2800 Cincinnati, Ohio 45202;

18 Ulmer & Berne, by JOSHUA A. KLARFELD, ESQ.,
19 1660 W. 2nd Street, Suite 1100, Cleveland,, Ohio 44113;

20 ALSO PRESENT:

21 Callan Stein

22 Mark Lipton

23

24

25

1 APPEARANCES (CONTINUED) :

2 VIA PHONE:

3 Elizabeth Cabraser

J. Gerard Stranch

4 Kim Dougherty

Mark Zamora

5 Colin Jones

Alyson Oliver

6 Elisha Hawk

Mary Gidaro

7 Douglas Mulvaney

H. David Gibson

8 Sharon Houston

William Riley

9 Rebecca Blair

Timothy Housholder

10 Harry Herzog

Sean Roth

11 Frank Federico

Ed Jazlowiecki

12 Shannon Carey

Robert Randall

13 Nolan Nicely

Michael Coren

14 Harry Roth

Chris Cain

15 Terry Dawes

Richard Golomb

16 J. Stephen King

Elliot Olsen

17 Bryan Bleichner

Caia Johnson

18 Scott Sexton

19

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PROCEEDINGS

THE CLERK: All rise. Court is now in session in re: New England Compounding Pharmacy cases. This is MDL No. 13-md-02419, Honorable F. Dennis Saylor presiding. Counsel, please note your appearances for the record.

MS. PARKER: Good afternoon, your Honor, Kristen Johnson Parker, lead counsel for the plaintiffs.

THE COURT: Good afternoon.

02:00PM

MR. SOBOL: Good afternoon, your Honor, Tom Sobol for the PSC.

THE COURT: Good afternoon.

MR. CHALOS: Mark Chalos, your Honor, federal state liaison for the plaintiffs.

MR. FENNELL: Good afternoon, your Honor, Patrick Fennell, plaintiffs' steering committee.

MR. LIPTON: Good afternoon, your Honor, Mark Lipton, plaintiffs' steering committee.

02:01PM

MR. FERN: Your Honor, Frederick Fern from Harris, Beach on behalf of NECC.

THE COURT: Good afternoon. I don't know if Harris, Beach is a place where you can lie out in the sun, but it looks like that's where you've been.

MR. FERN: There's no sunshine in my office.

THE COURT: Well, you've been somewhere else

1 then. Good afternoon.

2 MR. TRANEN: Good afternoon, Daniel Tranen
3 and Sean Culbertson for NECC.

4 MR. RABINOVITZ: Good afternoon, your Honor,
5 Dan Rabinovitz on behalf of Medical Sales Management,
6 Inc.

7 MS. NADEL: Good afternoon, your Honor,
8 Heidi Nadel. I am co-counsel with Mr. Fern's office for
9 Doug and Carla Conigliaro.

02:01PM 10 MR. DEAN: Good afternoon. My name is
11 Richard Dean. I'm counsel for Ameridose.

12 MR. GOTTFRIED: Michael Gottfried, counsel
13 for trustee, Paul Moore.

14 MR. STEIN: Callan Stein for Barry Cadden
15 and Lisa Cadden.

16 MR. ELLIS: Rick Ellis for various
17 plaintiffs.

18 MS. ANDREWS: Anne Andrews, co-chair of the
19 creditors' committee.

02:01PM 20 MR. MOLTON: Good afternoon, your Honor,
21 David Molton of Brown, Rudnick, counsel to the
22 creditors' committee.

23 MR. THOMAS: Your Honor, Joe Thomas for GDC.

24 MR. TUCKER: Scott Tucker for Ameridose,
25 your Honor.

1 MR. CIPORKIN: Ryan Ciporkin for Alaunus
2 Pharmaceutical.

3 MR. LEVY: And Franklin Levy for Alaunus,
4 your Honor.

5 MR. HUGO: Michael Hugo for Chad Green,
6 plaintiff, and on the telephone, I have Rob Jenner and I
7 believe Mark Zamora and Kim Dougherty.

8 THE COURT: I'm not asking the people on the
9 telephone to identify themselves. Good afternoon. I
02:02PM 10 want to begin by apologizing. I'm farther behind than I
11 expected to be. There's a reason for it, but it's not a
12 particularly good one, it's just the press of other
13 business, but, in any event, here we are.

14 I have issued an order appointing steering
15 committee lead counsel and federal state liaison
16 counsel. I'm going to follow that up shortly with
17 another order governing the question of the funding of
18 costs.

19 I wanted to give that some separate thought
02:03PM 20 and didn't want to hold up the whole appointment for
21 that, and I'm also going to issue a short order
22 concerning participation by telephone, the thrust of
23 which will be that anyone who wants to participate by
24 telephone and wants to be heard will have to give
25 advance notice.

1 I also expect, have not yet done so but
2 expect to issue the procedural order concerning the
3 Chapter 11 trustees' transfer motion. My original plan
4 was to set a deadline of April 16th, and because some
5 time has past, I would expect to give some additional
6 time there, perhaps till April 30th or so for people to
7 respond to that.

8 That also, I think, would cover the GDC
9 motion to withdraw the reference and perhaps the
02:04PM 10 Ameridose motion as well. There are some other issues,
11 including a motion from various plaintiffs in Roanoke,
12 Virginia concerning mandatory abstention that may
13 present some different issues, but I will get that
14 procedural order out, and I would expect no later than
15 tomorrow.

16 With that, let's talk about where we are and
17 what we have to do.

18 MS. PARKER: Your Honor, if I may.

19 THE COURT: Yes.

02:04PM 20 MR. FERN: Judge, just a point of
21 information regarding that April 30th date --

22 THE COURT: Yes.

23 MR. FERN: -- is it the Court's intention to
24 gather all of those motions with the same return date of
25 April 30th?

1 THE COURT: That was the plan. Originally I
2 said April 16th, and it's the Chapter 11 trustees'
3 motion, which is the principal issue, but there are ones
4 that are related, overlapping, intertwined, motions to
5 withdraw the reference. Motions to remand I think
6 probably just need to be put on hold. There are motions
7 to remand I think for lack of subject matter
8 jurisdiction, and if I'm going to take in all the state
9 cases, I think they get mooted, although there may be an
10 issue there I'm missing.

02:05PM

11 MR. FERN: So given the stay, Judge, the
12 April 30th date would be for briefing completion?

13 THE COURT: Filing oppositions and then
14 perhaps a reply brief, and then we can set it for
15 argument. I don't know how this is going to play out.
16 I mean, so far the only wrinkle that I didn't expect, I
17 guess, is this issue of the Roanke plaintiffs. I mean,
18 I suppose I should have seen it coming, but having read
19 the brief, it puts it in a factual context now that I
20 understand it a little better. I'm sorry, Ms. Parker.

02:05PM

21 MS. PARKER: Thank you, your Honor.
22 Plaintiffs have spoken with the trustee before this
23 hearing, and we had contemplated asking your Honor to
24 give us an extension until April 2d to file replies.

25 THE COURT: May 2d.

1 MS. PARKER: I apologize, May 2d, your
2 Honor, to file responses to the trustees' motion.

3 THE COURT: Why don't we call it May 2d. I
4 don't have any particular issue with the extra three
5 days.

6 MS. PARKER: Thank you.

7 THE COURT: May 2d it will be. We had also
8 agreed on a date for the trustees --

9 THE COURT: The time machine idea is great
02:06PM 10 if you have one.

11 MS. PARKER: I'll work on that.

12 THE COURT: But go on.

13 MS. PARKER: We had also agreed with the
14 trustee on a proposed date for the trustee to file a
15 reply. That date would be May 13th.

16 THE COURT: All right. May 13th for any
17 reply. That would be any reply memo, not just the
18 trustee. In other words, the Ameridose-GDC motions, any
19 reply brief would also be due May 13th.

02:06PM 20 MS. PARKER: Mr. Sobol is reminding me that
21 those deadlines, your Honor, assume that there's no
22 issue with having notice sent quickly by the trustee.

23 THE COURT: I'm assuming all of that. If
24 someone says they didn't have notice, we'll just have to
25 take that up in due course. I'm not sure how to handle

1 that. I need to issue the order. The notice needs to
2 go out. I mean, I would be surprised in the modern
3 world with ECF and electronic filing if people genuinely
4 didn't have notice of what was going on, but if
5 something comes up, I'll hear what people have to say
6 and respond accordingly.

7 MS. PARKER: Thank you.

8 THE COURT: Ms. Parker, while I'm on the
9 subject, and I don't know if anyone is present in person
10 or on the phone concerning these Roanoke cases, but do
11 I -- how do you propose that I handle that? This is the
12 motion for mandatory abstention on the grounds that
13 essentially the only federal issue is the possibility of
14 a claim for contribution and that there are state court
15 claims against state court defendants that are, at least
16 according to the file, proceeding toward trial in
17 Virginia?

18 MS. PARKER: We would suggest, your Honor,
19 that any oppositions to that motion be filed to track
20 the deadline we've imposed for oppositions or responses
21 to the trustees' motion, so that is to say also May 2d.
22 We would also suggest then if the Roanoke plaintiffs
23 wanted to file a reply that that date would likewise be
24 May 13th. We think these raise not necessarily
25 identical but similar issues, and, therefore, a

1 consolidated, rather, overlapping briefing schedule is
2 appropriate.

3 THE COURT: All right. Is anyone from the
4 Gentry, Locke Firm available who wants to respond to
5 that?

6 MR. SEXTON: Yes, your Honor, this is
7 Scott Sexton. We have no objection to that proposed
8 briefing schedule on that.

9 THE COURT: All right.

02:09PM

10 MR. SEXTON: There is a complicating issue
11 that has arisen in our cases in Roanoke. On Friday, a
12 series of motions to transfer to Federal Court were
13 filed and are being filed in all of those cases and
14 apparently with the knowledge of the trustee because
15 tag-along motions have been filed almost immediately,
16 and it seems as though there's an effort to
17 short-circuit or circumvent your motion that you have
18 before you with the transfer and our motion for
19 abstention because now we have a Federal Judge in
20 Roanoke, Virginia who has cases that involve state court
21 parties and don't have anything to do with NECC as a
22 party, and he has those cases, they're being
23 transferred, I mean, many cases transferred before him,
24 and we are in a position of having to deal with that
25 here locally as well. It's a disappointing turn of

1 events for us, but I wanted to bring it to your
2 attention.

3 THE COURT: All right. Who --
4 Mr. Gottfried, you represent a trustee?

5 MR. GOTTFRIED: I am.

6 THE COURT: Do you want to respond to that?
7 I'm sorry, Mr. Fern.

8 MR. FERN: Your Honor, honestly I was not
9 aware of what the complaint just was by the counsel from
02:10PM 10 the Gentry, Locke Firm in Roanoke. There were some
11 motions filed that removed the cases, and now we are
12 moving pursuant -- we filed a tag-along action to have
13 them sent here.

14 THE COURT: All right. Let's not -- I can't
15 sort this out right now. I mean, I can, of course,
16 always transfer something back if for some reason I
17 don't properly have it. Why don't we just let that play
18 out in due course. If necessary, I can, if anyone
19 thinks it would be helpful for me to get on the phone
02:11PM 20 and coordinate either with a Federal or State Judge in
21 Virginia, I'm happy to do that, but in the short run
22 anyway, I'm just going to let it play out through the
23 motion practice.

24 Why don't -- let me put that discussion on
25 pause, and I think I'd like to get an update on the

1 bankruptcy proceeding and where things are generally.

2 Who wants to take the lead on that, Mr. Gottfried?

3 MR. GOTTFRIED: I can give you that update,
4 your Honor.

5 THE COURT: All right.

6 MR. GOTTFRIED: I think two principal things
7 are going on currently in the bankruptcy, then there's
8 obviously some subsidiary events. I think the most
9 important event is that Mr. Moore is continuing his
10 dialogue with the defendants in the avoidance action.
11 He believes that they're continuing to make some, you
12 know, incremental progress.

02:11PM

13 What he has done is he has been giving them
14 extensions of between two and three weeks to respond to
15 the complaints so long as they're making progress, and
16 at this point he continues to believe that they are, so
17 that process is ongoing.

18 The trustee, now that he is in place, is
19 also in the process of pursuing accounts receivable that
20 are due NECC, and he's also filed motions to put, you
21 know, appropriate people in place to assist him with the
22 case, and that's largely where we are in the bankruptcy
23 right now, your Honor.

02:12PM

24 THE COURT: All right. Anything you want to
25 add to that, anyone, either on creditors' committee --

1 yes, I'm sorry.

2 MR. MOLTON: Thank you, your Honor.

3 THE COURT: I'm sorry, you're Mr. Molton?

4 MR. MOLTON: Mr. Molton, your Honor, from
5 Brown, Rudnick. Mr. Gottfried just gave his report, but
6 last week, there was a hearing in front of Judge Boroff,
7 among other things, that happened at that hearing is
8 that Judge Boroff did grant the trustees' motion, which
9 was supported by the creditors' committee, to extend out
02:13PM 10 the removal deadlines pursuant to Section 1452 of
11 Title 28, and those have been extended for an interim
12 period of a number of months subject to further
13 extension.

14 I do note, your Honor, that I don't believe,
15 and Mr. Gottfried will tell me if I'm wrong, but I don't
16 believe there were any objections to that motion
17 whatsoever.

18 Second, your Honor, the committees filed a
19 motion, as required to do pursuant to the bankruptcy
02:13PM 20 law, the code, to establish a creditors' committee, a
21 victim's website, and that's coming in front of
22 Judge Boroff again on the 17th of this month, where, if
23 all goes well, the Judge will enter an order that
24 establishes that website, which will provide information
25 as to the bankruptcy and other related issues to

1 creditors of NECP, including tort claimants, as well as
2 trade creditors or other creditors.

3 I do want to note, your Honor, that the
4 trustee and the committee are working very hard on
5 orders that will be establishing bar dates, some of
6 which may come in front of your Honor, and those orders
7 may impact and have case management implications in this
8 court, the MDL as well as have implications in the
9 bankruptcy as well.

02:14PM 10 THE COURT: Explain that to me.

11 MR. MOLTON: Judge, what we're doing is
12 setting forth a bar date procedure, and part of that
13 will require claims to be filed either in the bankruptcy
14 court or by way of plenary action in this court,
15 depending on certain circumstances.

16 The trustee and the committee have liaised
17 on that over the last couple of weeks. I know that
18 other people are getting involved in taking a look at
19 that as well, and that's one component of that order,
02:15PM 20 your Honor, that will establish filing procedures both
21 with respect to meeting a bar date in the bankruptcy
22 court, which may involve filing of actions in this court
23 as well that for certain actions will be sufficient to
24 meet the bar date.

25 We're not yet ready to bring that to your

1 Honor, but I do want to let your Honor know of it. Part
2 of that order also may have case management procedures
3 in it, and I do note that your Honor is aware of some of
4 the case management orders that were entered in other
5 cases including I know in the trustees' motion, he
6 submitted to you the Ephedra case management order that
7 has within it mediation requirements and other various
8 provisions that seek to progress and implement possible
9 resolutions of matters in an expeditious manner, but
10 that's ongoing, your Honor, and that's not yet ready to
11 be brought out in front of this Court, but hopefully
12 soon.

02:16PM

13 THE COURT: Okay. Anything else in terms of
14 an update on the Chapter 11 proceeding?

15 MR. MOLTON: Judge, that's it from our side.

16 THE COURT: All right. In no particular
17 order, the question or the questions on my mind is what
18 makes sense to tackle next? I have these Alaunus
19 motions to dismiss, I have a number of matters that are
20 somewhat suspended in mid-air, but are we going to
21 develop, for example, a master complaint and a master
22 answer? Should that be put on a -- should that be made
23 a priority? Is there anything with regard to discovery
24 that makes sense for me to address now?

02:16PM

25 Ms. Parker, what's your view? What do you

1 think I should do next?

2 MS. PARKER: I have to tell you, your Honor,
3 no Judge has ever asked me that directly before.

4 THE COURT: I wouldn't say I would agree
5 with you, I am just asking for your opinion.

6 MS. PARKER: I appreciate that. Since the
7 PSC is newly appointed, your Honor, we would appreciate
8 a short period of time to consider, to meet, to discuss
9 amongst ourselves also with the trustee and report back
10 to your Honor how we think we should move forward.

02:17PM

11 Among the things that we will be discussing
12 certainly are the idea of a master complaint and perhaps
13 master answer and certainly discovery. As to the
14 Alaunus motion to dismiss, I believe that the Court's
15 remarks at the last status conference had rolled over
16 that deadline until at least today to respond to those
17 motions.

18 THE COURT: It's something of a placeholder,
19 in other words, if I wanted to decide today, I could set
20 a briefing for a response to that and just take it up,
21 it's not in every case, or I could await the development
22 of a master complaint. I'm not sure it makes sense to
23 wait or not, I'm not sure what the most economical thing
24 to do is.

02:18PM

25 If there are parties in the case that don't

1 belong, we could get rid of them. On the other hand, if
2 it's a Rule 8 issue, if it's just a pleading issue, I
3 haven't really gained much of anything if I'm dismissing
4 a small number of individual complaints with a master
5 complaint that names Alaunus to follow, so that's why
6 I'm teeing it up.

7 MS. PARKER: Our suggestion, your Honor,
8 would be that you continue the deadline to respond to
9 those motions to dismiss, at least until the PSC is able
10 to formulate a suggestion as to whether we move forward
11 with the master complaint.

12 As you've recognized today and I think we've
13 discussed last time, if there is a master complaint
14 naming Alaunus, we may wind up litigating this all over
15 again, so while we have no interest in stalling that
16 procedure, we would ask for a little bit of time.

17 THE COURT: All right. Again, this is easy
18 for me to say and may be difficult in practice, but in
19 every large litigation I've ever been involved in, there
20 are what I'll call peripheral parties, some of whom
21 belong in the case and some of whom don't, and I think
22 it would be desirable to sort that out sooner rather
23 than later to the extent that we can fairly under the
24 rules of procedure, but I guess I'm inclined to follow
25 your suggestion, at least put that on pause for now.

1 Who represents Alaunus again?

2 MR. LEVY: Franklin Levy, your Honor, and
3 Ryan Ciporkin. That's fine with us, we filed our
4 motions, and we're just awaiting the decision. I think
5 a response has been filed as well.

6 MR. CIPORKIN: Responses have been filed in
7 three cases. There's a number of them that no
8 opposition has been filed.

9 THE COURT: I think I suspended filing of
02:20PM 10 oppositions I think until today, and I expect to roll
11 that over.

12 MR. LEVY: We'll just sit and wait.

13 THE COURT: All right. That applies as
14 well, there are complaints obviously that have not been
15 responded to. I'm going to extend that deadline as
16 well, and what I'm thinking of in terms of discovery, I
17 guess, is, again, I would like to accomplish anything
18 that can be accomplished in short term that we know will
19 not be wasteful activity, for example, the collection of
02:20PM 20 plaintiffs' medical records, medical authorizations,
21 product I.D. information.

22 It seems to me no matter what form this case
23 takes going forward, that information will be relevant
24 and useful. I don't see any real reason for delaying
25 that terribly long. What is plaintiff's view on that?

1 And I understand the PSC has just been appointed and you
2 may not have had a chance to discuss it.

3 MS. PARKER: On a voluntary basis, your
4 Honor, the plaintiffs have undertaken the process of
5 collecting medical records and product I.D. records.
6 We've been doing that without a Court Order in place but
7 as a matter of course.

8 We also had early on in this litigation,
9 before NECC filed for bankruptcy, had begun the process
02:21PM 10 of negotiating with the defendants on how we might go
11 about that process including what the particular
12 releases would be. I think we're ready to continue
13 those discussions with the defendants, and we will
14 continue working on that.

15 THE COURT: Okay. Yes, I'm sorry, did you
16 want to --

17 MR. FERN: No.

18 THE COURT: Did you want to say something,
19 Mr. Molton?

02:21PM 20 MR. MOLTON: Yes, I'm sorry, your Honor, I
21 do want to note, your Honor, that one of the things
22 relating to the bar date and the claims filing procedure
23 is that part of that may be and probably will be an
24 information sheet that will assist all the parties to
25 this MDL as well as the bankruptcy in understanding each

1 plaintiff's claim. They'll be confidentiality aspects
2 to that as well, but also in conjunction with that and
3 as part of the contemplated bar date and claims order,
4 your Honor, would also be a requirement to serve a
5 medical release, basically have each plaintiff who's
6 filing a claim submit a medical release form that
7 complies with law.

8 So, these are things also that are pertinent
9 to the bankruptcy claims filing that may be part of
02:22PM 10 again, you know, a coordinated order between you and
11 Judge Boroff.

12 MS. ANDREWS: Your Honor, I'd just like to
13 add to those comments. Part of the hard work of the
14 creditors' committee, and it's made up of nine tort
15 claim representatives has been to actively work with the
16 trustee and with other parties to bring this information
17 sheet into the claims process.

18 The challenge of a creditor group in a case
19 like this, particularly a case with this amount of
02:23PM 20 injuries and an ongoing type of medical injury, is to
21 get its arms around the creditors, the creditor group,
22 the size and number of them, the types of damages they
23 have so that the process of dealing with those claims,
24 including allowance of claims and disallowance of claims
25 and the interplay between this court and the bankruptcy

1 court, can be very well handled and managed with an
2 information process that Mr. Molton and Mr. Gottfried
3 and the trustee have been working on and the creditor's
4 committee fully supports.

5 THE COURT: Okay. Anyone else want to weigh
6 in on any issues relating to discovery? I guess what I
7 would propose is rolling over the stay of discovery in
8 this litigation for the time being as these issues
9 continue to develop and unfold.

02:24PM 10 Does anyone want to be heard on that? All
11 right, hearing nothing --

12 MR. FERN: Judge, no objection there, in
13 speaking to the trustee before appearing in court this
14 morning, this afternoon, the trustee also agrees with
15 the continuation of the discovery stay. I assume
16 Ameridose also joins in that.

17 MR. DEAN: Yes.

18 THE COURT: Okay. Backing up a little bit,
19 as I indicated, I'm going to issue an MDL order
02:24PM 20 concerning funding of costs on the plaintiff's side of
21 the house. That gave me some pause just because
22 I -- well, I'm not entirely confident as to whether this
23 is the approach that ought to be taken because it's in
24 part a Court Order addressing things that might
25 otherwise be covered by a private agreement.

1 I'm going to issue an order in substantially
2 the form that was suggested to me. If for some reason a
3 dispute arises or people think that somehow as a result
4 they're not treated fairly, it is by no means carved in
5 stone, and I will be prepared to either modify the order
6 or take up issues that are within my authority and
7 jurisdiction, but I am convinced that issuing an order
8 of that nature is necessary under the circumstances.

02:25PM 9 Is there anything else on any topic that
10 anyone wants to take up? Let me start with the
11 plaintiffs, Mr. Sobol or Ms. Parker?

12 MR. SOBOL: May I address the Court standing
13 up? Your Honor, I break out in hives sitting down
14 addressing the Court.

15 THE COURT: The only reason I'm having
16 people sit down, so the people on the phone can hear
17 you, as long as you're loud enough that the mic. will
18 pick up.

02:26PM 19 MR. SOBOL: The only thing I wanted to
20 address with your Honor, and there's nothing that you
21 need to act on, but I just wanted to make it clear at
22 this very early stage of the PSC that although there was
23 a difference of opinion among the applicants for the
24 plaintiffs' steering committee position, it's the
25 intention of the PSC that you have put in place to work

1 and to strive to have the greatest participation
2 possible by all the other lawyers that are out there.

3 In particular, there are eight members of
4 the creditors' committee that have been doing very
5 significant, very serious work, and we're going to not
6 have any duplication, and we're going to not recreate
7 any new wheels with them, they've been doing a fantastic
8 job.

9 There are other lawyers that are out there
02:26PM 10 as well, including Mr. Ellis, who I have known and
11 worked with for 30 years, so and I know that's a little
12 bit of a grand-standing thing, but I just want to --
13 because there's some people that are on the phone, and
14 we're getting going right now, and I haven't gotten my
15 e-mail out to everybody, and I want this Court to know,
16 too, that from the plaintiff's point of view, it's going
17 to be many hands makes light work, and it's not going to
18 just be from the PSC.

19 THE COURT: I'll echo that thought. First
02:27PM 20 off, that's what I hope and expect will happen. Second,
21 I found the decision unusually difficult because both
22 sets of lawyers were well qualified, extremely well
23 qualified, and I have particular -- I don't know the
24 out-of-state lawyers, but certainly I know Mr. Ellis
25 well enough by experience and reputation to have a very

1 high opinion of him, and I was concerned about, you
2 know, to what extent there should or should not be an
3 overlap of the creditors' committee, but I do appreciate
4 the remarks you've made, and I hope it goes forward as
5 you indicated.

6 All right. Anything else from the
7 plaintiffs? All right, nothing. Anything any defense
8 counsel wants to take up?

9 MR. DEAN: Your Honor, Richard Dean. You
02:28PM 10 made brief reference to it, but we do need to have an
11 agreed date by which answers are due because you
12 continued the answer date to complaints to today's
13 hearing.

14 THE COURT: Yes.

15 MR. DEAN: We need to know what that is.

16 THE COURT: Yes, what I'm going to do is set
17 another status conference date. I'm going to roll that
18 over because I expect it's going to be folded into a
19 master complaint and that we won't have to go through
02:28PM 20 this exercise, but, in the meantime, I'm just going to
21 keep extending it for want of a better idea.

22 Peter, let me look at the calendar. I might
23 as well try to set that date right now. In terms of the
24 next conference, I have the afternoon of Monday, May 6th
25 is available. Again, I know it's going to be impossible

1 to have everyone agree on a date. I have some time in
2 the prior week, but it's more crowded or I can go later
3 into that week. Does anyone have a preference? I think
4 Monday, May 6th works best for me.

5 MR. SOBOL: If I may, your Honor?

6 THE COURT: Yes.

7 MR. SOBOL: That date is fine from the PSC's
8 point of view. I just want to remark, although I'm not
9 trying to change the date, that the briefing is going to
10 be completed on May 13th for the other procedural
11 matters that are important, and I don't know if the
12 Court intends to have an argument, but you might
13 consider having the status conference and argument on
14 the same date, if that's your prerogative.

02:30PM

15 THE COURT: All right. We could do that on
16 Wednesday, May 15th. That's perfectly sensible to me,
17 and we can have argument that day, 2:00, Wednesday,
18 May 15th.

19 MS. PARKER: That's fine for the plaintiffs,
20 your Honor.

02:30PM

21 MR. FERN: Judge, I apologize, May 15th is
22 the National Drug and Device meeting by the Defense
23 Research Institute, and I know Mr. Dean will be
24 attending, as will I.

25 THE COURT: Where is that going to be?

1 MR. FERN: In New York City.

2 THE COURT: Not Las Vegas?

3 MR. FERN: New York City on Seventh Avenue,
4 Judge.

5 THE COURT: How about the --

6 MR. SOBOL: The 16th?

7 MR. FERN: Monday, Tuesday would be fine, if
8 the Court's schedule can accommodate us.

02:31PM 9 THE COURT: Monday, the 13th is the day the
10 reply briefs are due. How about Tuesday, the 14th, at
11 2:00?

12 MS. PARKER: That's fine, your Honor.

13 THE COURT: And Mr. Gottfried, does that
14 work for you?

15 MR. GOTTFRIED: The 14th is fine at 2:00,
16 thank you, your Honor.

17 THE COURT: Why don't we do that. It will
18 be a further status conference. I'll also hear argument
19 on Chapter 11 trustees' motion and related motions, and
02:31PM 20 I will extend the time in which parties may respond to
21 motions to dismiss by Alaunus and the time in which
22 parties should respond to any pending complaint to
23 May 14th, and I'll stay discovery till May 14th as well.

24 Does that cover everything? Have I
25 forgotten to extend anything?

1 MS. PARKER: I believe that's everything,
2 your Honor.

3 THE COURT: Again, I will try to get that
4 procedural order concerning the Chapter 11 motion,
5 Chapter 11 trustee as a motion out tomorrow as well as
6 the remaining procedural orders governing the PSC.

7 I notice, by the way, as a procedural
8 matter, things are still being docketed both with the
9 MDL number and the Erkan number, 12052. My
02:33PM 10 understanding is that everything relating to all cases
11 was going to be in the MDL docket, which is creating
12 some confusion on my part. I don't know if that was
13 intentional or not, but unless anyone thinks that's a
14 bad idea, if it's an Erkan-related motion, it needs to
15 be on the Erkan docket, but if it relates to all
16 actions, it needs to be on the MDL docket to make sure I
17 see it and I don't have to keep checking back and forth.

18 Does anyone have an issue with that? I
19 think it's probably just people are using an old caption
02:33PM 20 or something or filing on CM-ECF in the wrong place, and
21 I'm easily confused anyway, and this is not helping.

22 All right. Pending further order then, if
23 it's a document that relates to all cases, it will be
24 filed in the MDL docket so I can at least look at it and
25 see what's going on, hopefully.

1 All right. Anyone else want to be heard on
2 any topic at all? Yes, sir.

3 MR. MOLTON: Your Honor, David Molton again.
4 This is out of my bailiwick, and I didn't have an
5 opportunity to talk with the other parties, but one of
6 our members passed up and asked me to raise this issue,
7 and I'm certainly not an expert on it, but apparently
8 with respect to a number of the cases that are pending
9 in front of your Honor and especially cases that are
02:34PM 10 being transferred in, what I've been told is that under
11 various local laws, there may be certain filing
12 deadlines in addition to the filing of the complaint
13 such as certificates of merit and other state
14 law-related guidelines or deadlines, and what our
15 committee member asked me to do is to raise this issue
16 with your Honor and see whether, you know, what your
17 Honor's view is with respect to the cases in front of
18 your Honor, at least for the time being for those cases
19 for which there are these state law extra filing
02:34PM 20 deadlines, as I would call them.

21 I'm staying those or holding those over so
22 that that can be dealt with in a more fulsome matter at
23 the next status conference.

24 THE COURT: I guess the first question is,
25 as an Erie issue there, does this apply in Federal Court

1 at all? I don't know what a certificate of merit is. I
2 don't know how they apply or not. I will freely grant
3 extensions if this is something that needs to be done,
4 but I guess I'd be surprised -- if it's a state law
5 procedural issue, I'd be surprised if it applied in
6 Federal Court.

7 If it's a local rule of let's say the
8 District of Minnesota or The Middle District of
9 Tennessee, I would assume, without having given it very
02:35PM 10 much thought, that our law rules now take over because
11 the case is pending in front of me and would supersede
12 that, and if I need to issue any orders or grant relief
13 to work this through, I'm happy to do that.

14 It's kind of an abstract question without
15 knowing.

16 MR. MOLTON: From my end, too, I'm sorry.

17 THE COURT: No, that's fine.

18 MS. ANDREWS: Your Honor --

19 THE COURT: Yes.

02:35PM 20 MS. ANDREWS: -- this is Anne Andrews,
21 excuse me. My committee colleague indicates that it is
22 a substantive issue, it would be subject to the Erie
23 doctrine, and if perhaps by letter, brief or some other
24 method we could bring that issue before the Court, it is
25 a very big issue limiting in some states where they've

1 been removed or transferred here, and we're going to
2 need some guidance at some level, and Mr. Wright is in
3 the court, and it is of greatest concern to him, if
4 you'd like him to address it with you briefly.

5 THE COURT: Mr. Wright. I'm sorry, where
6 are you from?

7 MR. WRIGHT: I'm from Florida, your Honor, I
8 didn't sign in, but in Florida actions against
9 healthcare providers, for example, would have to go
02:36PM 10 through a presuit screening and investigation procedure,
11 and I think it's true in a number of states under the
12 state's substantive law.

13 THE COURT: Would that apply to a
14 compounding pharmacy as well as direct provider?

15 MR. WRIGHT: It would not apply to the
16 compounding pharmacy, but it would apply to the clinics
17 that distributed the product who would be brought in a
18 joint action.

19 THE COURT: All right.

02:37PM 20 MR. SOBOL: I'll suggest, your Honor, that
21 we can work with Mr. Wright to prepare a proposed order,
22 obviously run it by the defendants as well.

23 THE COURT: The one thing that Ms. Andrews
24 referenced, a letter brief. If you're asking me to do
25 anything, call it a motion and check the right box

1 because otherwise it disappears in cyberspace. I look
2 on the system for pending motions, and if it doesn't
3 have that signal, I may not see it for some time.

4 MR. WRIGHT: Absolutely, absolutely.

5 THE COURT: Okay. Anything else on that
6 topic? Yes, sir.

7 MR. BLUMBERG: Your Honor, this is
8 Jay Blumberg. I represent a number of defendants from
9 New Jersey, and it was on that very issue. In
10 New Jersey, the substantive law is that there needs to
11 be an affidavit of merit filed within 120 days of the
12 answer being filed.

13 THE COURT: Again, in an action against a
14 healthcare provider, is that the idea?

15 MR. BLUMBERG: Yes, and I represent both the
16 physician as well as the surgical center in about 15 of
17 these cases, and I didn't want to run afoul of your
18 Honor's rulings as to whether these are appropriate
19 motions to bring or not given the status of what the
20 Court has done.

21 THE COURT: Well, again, you'll just have to
22 tee that up. Certainly in Massachusetts you can't bring
23 a medical malpractice action without it run through a
24 tribunal or posting a bond. I mean, my experience is
25 most states have something like this, but how it applies

1 in this case, I'll just have to take up on a one-by-one
2 basis, and if what you need is an extension of time,
3 I'll give that out freely, and if you need something
4 else, I'll take it a step at a time. I don't know what
5 to tell you.

02:39PM 6 MR. BLUMBERG: Well, it's not me that would
7 need the extension, it would be the plaintiff who has to
8 file the affidavit of merit within 120 days. I haven't
9 seen an affidavit of merit at this point in time, and I
10 would file the appropriate motion within that time.
11 That may tee it up for your Honor so that you may decide
12 it at that point.

13 THE COURT: All right. And I don't know if
14 other states have this requirement. In Massachusetts,
15 it takes time, you know, it goes through a tribunal, and
16 it takes awhile to get through it, and sometimes actions
17 are stayed pending that, and sometimes they go on
18 against other defendants. Just present this issue to
19 me, if there's something I need to decide, and I will do
02:39PM 20 my best to decide it. I don't know what else to say at
21 this point.

22 MR. BLUMBERG: As long as I'm not running
23 afoul of your Honor's ruling, I have no problem doing
24 that.

25 THE COURT: No.

1 MR. BLUMBERG: And just so the Court's
2 aware, the claim against the physicians is not in
3 products liability but in negligence.

4 THE COURT: Yes. All right. One more thing
5 on the list to do. Anyone else want to raise any other
6 issues? All right, thank you, all.

7 MR. FERN: Judge, I'm sure your courtroom
8 deputy and your office has the entire list of cases
9 together, but in order to assist, if that hasn't been
02:40PM 10 done, I have two lists here, if I can approach, one with
11 all of the actions that have been transferred to your
12 Honor's court together with the CTO number which
13 transferred them.

14 THE COURT: All right.

15 MR. FERN: I also have another list of cases
16 that are not in the MDL either because NECC is not a
17 party, we have no standing to remove, or they were
18 subject to a CTO and there's a motion to vacate that's
19 pending so the transfer has not taken place.

02:40PM 20 THE COURT: Okay. Pending before the
21 judicial?

22 MR. FERN: And if the Court would like, I
23 can make a call and have them sent electronically within
24 a half an hour.

25 THE COURT: You can just hand those up.

1 Pending before the JPML, in other words, someone has
2 objected to the CTO?

3 MR. FERN: Yes.

4 THE COURT: All right. Anyone else? Unless
5 there's anything further, thank you, and I'll see you
6 next month.

7 MS. PARKER: Thank you, your Honor.

8 (Whereupon, the hearing was adjourned at
9 2:41 p.m.)

02:41PM

10 C E R T I F I C A T E
11 UNITED STATES DISTRICT COURT)
12 DISTRICT OF MASSACHUSETTS) ss.
13 CITY OF BOSTON)

14 I do hereby certify that the foregoing
15 transcript, Pages 1 through 36 inclusive, was recorded
16 by me stenographically at the time and place aforesaid
17 in MDL No. 13-2419-FDS, IN RE: NEW ENGLAND COMPOUNDING
18 PHARMACY CASES LITIGATION and thereafter by me reduced
19 to typewriting and is a true and accurate record of the
20 proceedings.

21 Dated this 25th day of April, 2013.

22 s/s Valerie A. O'Hara

23

24 VALERIE A. O'HARA

25 OFFICIAL COURT REPORTER